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A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Florida Allowing the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Organized Bar.

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COMMENTS

A SOURCE OF REVENUE FOR THE IMPROVEMENT OF LEGAL SERVICES, PART I: AN ANALYSIS OF THE PLANS IN FOREIGN COUNTRIES AND FLORIDA ALLOWING THE USE OF CLIENTS' FUNDS HELD BY ATTORNEYS IN NON-INTEREST-BEARING TRUST ACCOUNTS TO SUPPORT PROGRAMS OF THE ORGANIZED BAR

TAYLOR S. BOONE

A recent opinion of the Florida Supreme Court may be the harbinger of plans in the United States to subsidize programs of the bar through the use of clients' funds.¹ Upon application by the Florida Bar, the supreme court of that state approved a voluntary plan, modeled in part on the plans of other common law countries, whereby attorneys may place the non-interest-bearing trust funds of clients in savings accounts.² The court recognized that there are often times when the sums of money held by an attorney in trust for a client are so small and are held for such a short period that it is impractical and uneconomical to invest the funds and account to the client for the earnings.³ The court realized, however, that if all these funds, which would otherwise remain idle in demand deposits, were aggregated in a trust savings account and the expensive requirements of allocating and accounting to each client were waived, significant interest income could be earned.⁴ Accordingly, the court directed that such interest be remitted to the Florida Bar Foundation⁵ which, in turn, would allocate

1. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 799-800 (Fla. 1978); 2 ABA DISCIPLINARY L. & PROC. ADVANCE SHEETS 1 (1978). Funds will be used for numerous programs including improvement of lawyer disciplinary processes and expansion of legal aid to the poor. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 811 (Fla. 1978).

2. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 801, 803-07 (Fla. 1978).

3. See *id.* at 801, 806. Even an investment in a savings account might be impractical and uneconomical. For example, the earnings that would accrue on \$500 placed in a savings account yielding six percent for a week would not pay for the attorney's accounting costs. The earnings would amount to less than sixty cents, or $\$500 \times 6\% \times 7 \text{ days} / 365 \text{ days}$. Such earnings might not even cover the cost of accounting paper and adding machine tape, much less the bookkeeping labor expense.

4. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 801-03 (Fla. 1978). An attorney would still incur expenses to maintain adequate accounting procedures and records on the principal of clients' funds. See FLA. STAT. ANN., Integration Rule 11.02(4)(c) (West Supp. 1968-1978).

5. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 807 (Fla. 1978).

this revenue to various public interest programs that affect the legal profession.⁶ It must be emphasized that the plan is voluntary⁷ and does not restrict an attorney's discretion to invest his clients' trust funds solely for their benefit.⁸

This comment will explain how clients' trust funds may be employed legally to support programs of the organized bar. It will discuss the plans in other common-law countries and analyze the scheme adopted in Florida.

BACKGROUND

A Reason for Change

The sufficiency of legal services in the United States remains an unresolved problem.⁹ It is the duty of every attorney to make available to all people adequate legal services;¹⁰ in fact, it has been implied that legal service is a basic right of every citizen of the United States.¹¹ Yet, there are specific indications that Americans, especially those in the lower income brackets, have very limited access to attorneys.¹² Although numerous experiments have been attempted to improve availability, legal services remain woefully inadequate, especially with regard to the poor.¹³ Apparently, the common denominator to the solution of the problem of insufficient legal services is money.¹⁴ For example, the cost of furnishing adequate legal service to the poor in the United States has been estimated to be \$500 million.¹⁵ Such financial resources are not currently available, either from

6. See *id.* at 805.

7. See *id.* at 804.

8. See *id.* at 807.

9. See Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. REV. 438, 438 (1965). See generally Cramton, *Introduction: An International Comparison of Legal Services for the Poor*, 10 CORNELL INT'L L.J. 205, 205-06 (1977).

10. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2; FLA. STAT. ANN., Code of Professional Responsibility, Canon 2 (West Supp. 1968-1978); State Bar of Texas, Rules and Code of Professional Responsibility, Canon 2 (1973). See generally Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. REV. 438, 443-46 (1965).

11. See Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1322-23, 1329-36 (1966). See generally Bamberger, *The American Approach: Public Funding, Law Reform, and Staff Attorneys*, 10 CORNELL INT'L L.J. 207, 208 (1977).

12. See Bamberger, *The American Approach: Public Funding, Law Reform, and Staff Attorneys*, 10 CORNELL INT'L L.J. 207, 208 n.6 (1977); Cramton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670, 672-74 (1976).

13. See Bamberger, *The American Approach: Public Funding, Law Reform, and Staff Attorneys*, 10 CORNELL INT'L L.J. 207, 208 (1977); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1323 (1966).

14. See Bamberger, *The American Approach: Public Funding, Law Reform, and Staff Attorneys*, 10 CORNELL INT'L L.J. 207, 208 (1977).

15. See *id.* at 208.

private foundations or governments.¹⁶ One of the major objectives of the plan adopted in Florida is to insure that funds to support adequate legal services are forthcoming.¹⁷

Attorney's Duties and Obligations When Managing a Client's Money

Before delving into the history of the use of clients' trust funds to support legal programs, it is necessary to review the duties and obligations of an attorney in managing a client's money. The Code of Professional Responsibility contains an ethical consideration recommending the separation of client's funds from those of the attorney.¹⁸ The disciplinary rules of the same canon specifically prohibit an attorney from commingling his funds with those of his clients except in a few limited circumstances.¹⁹ Even consent by the client that his funds may be commingled with his attorney's does not relieve an attorney from the requirements of the Code.²⁰

An attorney for various reasons will often hold money in trust for a client.²¹ Commonly, the attorney will hold the funds based upon some agreement forming an express trust,²² and his duties as trustee will be measured by the terms of the agreement.²³ As trustee the attorney must act in good faith and with due care, diligence, and skill, primarily to safeguard the principal of the trust²⁴ and, secondarily, to keep the trust

16. See *id.* at 208; Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1323 (1966).

17. See *In re* Interest on Trust Accounts, a Petition of the Florida Bar, 356 So. 2d 799, 805, 811 (Fla. 1978).

18. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 9-5. This same ethical consideration has been adopted in Florida and Texas. See FLA. STAT. ANN., Code of Professional Responsibility EC 9-5 (West Supp. 1968-1978); State Bar of Texas, Rules and Code of Professional Responsibility EC 9-5 (1973).

19. FLA. STAT. ANN., Code of Professional Responsibility DR 9-102 (A) (West Supp. 1968-1978). This disciplinary rule is identical to that promulgated by the American Bar Association and adopted by the Texas Supreme Court. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(A); State Bar of Texas, Rules and Code of Professional Responsibility DR 9-102(A) (1973).

20. See *Archer v. State*, 548 S.W.2d 71, 74 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

21. For example, an attorney might hold the funds of a client by virtue of closing a purchase of real estate, the settlement of an estate, the collection of a debt, or the receipt of a judgment and award on behalf of the client.

22. An express trust can be created in a number of ways, one of which is simply an agreement in writing. See *Miller v. Donald*, 235 S.W.2d 201, 205 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.); TEX. REV. CIV. STAT. ANN. art. 7425b-7 (Vernon 1960).

23. See, e.g., *Jackson v. Templin*, 66 S.W.2d 666, 670-71 (Tex. Comm'n App. 1933 judgment adopted); *Hays v. Harter*, 177 S.W.2d 797, 798 (Tex. Civ. App.—El Paso 1943, writ ref'd); *John Hancock Mut. Life Ins. Co. v. Duval*, 96 S.W.2d 740, 743 (Tex. Civ. App.—Eastland 1936, writ ref'd).

24. See *Vest v. Bialson*, 293 S.W.2d 369, 379-80 (Mo. 1956); *Finley v. Exchange Trust Co.*, 80 P.2d 296, 303 (Okla. 1938). See generally G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 541-544 (rev. 2d ed. 1978).

funds properly invested.²⁵ When the agreement gives no direction for the investment of trust funds, the trustee is left to his own discretion within statutory limits.²⁶ A trustee is expected to invest the funds under his control as soon as practical,²⁷ unless such funds are to be delivered presently to the beneficiaries or the trustor²⁸ or unless the sum is too small to be invested economically.²⁹ Thus, a trustee's duty to invest does not require investment when it is apparent that any investment will yield a loss.³⁰ For example, if an attorney knew that his administrative costs for processing any investment of a small trust would exceed the yield,³¹ his only prudent course of action would be to place the money in a non-interest-bearing demand account.³²

CLIENTS' TRUST FUNDS IN SELECTED FOREIGN COUNTRIES

In a number of jurisdictions throughout the world, clients' trust funds which are not specifically held for investment by an attorney for his clients are invested for the benefit of public legal programs.³³ The systems developed in each country are different, but the end result is the same: the use of clients' funds without the clients' ever realizing any direct benefit. The following discussion will review and compare the systems or plans that have been enacted in Australia, Canada, and the Republic of South Africa.

Australia

No single Australian statute provides nationally for the use of interest on trust accounts. Instead, five of the states in Australia have separate

25. See, e.g., *Title Guarantee & Trust Co. v. Bedford*, 5 A.2d 852, 854 (Conn. 1939); *Kimball v. Reding*, 31 N.H. 352, 373-74 (1855); *Finley v. Exchange Trust Co.*, 80 P.2d 296, 303 (Okla. 1938). See generally G. BOGERT & G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 541-544 (rev. 2d ed. 1978).

26. See generally TEX. REV. CIV. STAT. ANN. art. 7425b-46A (Vernon Supp. 1978-1979) (trustee may invest as would ordinary, prudent man in such investments as bonds, debentures, stock, investment trusts and mutual funds).

27. See *Moore v. Sanders*, 106 S.W.2d 337, 339 (Tex. Civ. App.—San Antonio 1937, no writ).

28. See *Liberty Title & Trust Co. v. Plews*, 61 A.2d 297, 298 (N.J. Ch. 1948), modified on other grounds, 70 A.2d 784 (N.J. Super. Ct. App. Div. 1949), rev'd in part, aff'd in part, 77 A.2d 219 (N.J. 1950).

29. See *Knowlton v. Bradley*, 17 N.H. 458, 459 (1845).

30. Cf. *State ex rel. Torrence v. Davidson*, 92 N.C. 408, 410-11 (1885) (trustee should enforce choses in action, debts, and demands unless enforcement would cause loss).

31. Generally, a trustee is entitled to be reimbursed for administrative or operating expenses incurred in carrying out the trust. See, e.g., *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 122-23 (1885); *Trustees v. Greenough*, 105 U.S. 527, 532-36 (1881); *Van Gemert v. Boeing Co.*, 573 F.2d 733, 735 (2d Cir. 1978). See generally TEX. REV. CIV. STAT. ANN. art. 7425b-4(K) (Vernon 1973) & art. 7425b-36 (Vernon Supp. 1978-1979).

32. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 801 (Fla. 1978).

33. See *id.* at 803.

statutes: Victoria,³⁴ New South Wales,³⁵ South Australia,³⁶ Queensland,³⁷ and the Australian Capital Territory.³⁸ The Australian state of Victoria was the first state to adopt a system whereby interest on certain trust accounts would be dedicated to support a Solicitors' Guarantee Fund.³⁹ Although the possibility of using interest on clients' trust funds to support the Guarantee Fund first surfaced in 1952,⁴⁰ not until 1963 did the Victorian Parliament seriously consider this source of income.⁴¹ Finally, in 1964 when the Guarantee Fund could no longer service all the claims, the opposition of the banks was overcome.⁴² Within a few years after enactment, this source of revenue became more than sufficient to support the Solicitors' Guarantee Fund.⁴³ As a consequence of the availability of funds, the Law Foundation was created for the purpose, in part, of improving the practice of law in Victoria.⁴⁴ Other Australian states followed Victoria's lead and soon enacted similar statutes.⁴⁵

Although the statutes of four Australian states are not totally uniform, they are similar enough to form a common scheme that may be referred to as the "Australian Plan."⁴⁶ The plan, except in the state of South Aus-

34. See Legal Profession Practice Act, VICT. STAT. No. 6291, § 40 (1958), as amended by Acts Vict. No. 7226, sec. 6, at 443 (1964), as amended by Acts Vict. No. 8954, sec. 40 (1976).

35. See Legal Practitioners Act, 1898-1954, PUB. ACTS N.S.W. No. 22, § 42 (1960), as amended by Stat. N.S.W. No. 29, sec. 7(b) (1967).

36. See Legal Practitioners Act, 1936-1972, PUB. GEN. ACTS S. AUSTRALIA. §§ 22-24d (1978).

37. See Legal Assistance Act, QUEENSL. STAT. No. 67, sec. 10, at 908-10 (1965), as amended by QUEENSL. STAT. No. 46, sec. 3 (1970).

38. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 803 n.25 (Fla. 1978).

39. See Dawson, *The Solicitors' Guarantee Fund*, 49 LAW INST. J. 16, 17-18 (1975). See generally Legal Profession Practice (Amendment) Act, Acts Vict. No. 7226, sec. 6(2) at 43-45 (1964), as amended by Acts Vict. No. 8954, sec. 40 (1976). The Solicitors' Guarantee Fund is comparable to the clients' security funds found in many states of the United States whereby clients may be reimbursed for all or a portion of the pecuniary losses they suffer because of dishonest acts of their attorneys. See generally Atkins & Kane, *Clients' Security Fund Maintains Bar's Integrity*, 44 FLA. B.J. 130, 130 (1970); Wray, *A New Way to Serve Our Clients: The Clients' Security Fund*, 35 TEX. B.J. 1023, 1023 (1972).

40. See Dawson, *The Solicitors' Guarantee Fund*, 49 LAW INST. J. 16, 17 (1975).

41. See *id.* at 17.

42. See *id.* at 17.

43. See *id.* at 17-18. See generally Legal Profession Practice Act, VICT. STAT. No. 6291, §§ 52-73 (1958), as amended by Acts Vict. No. 7226, secs. 8-14 (1964) (creating and funding Solicitors' Guarantee Fund).

44. See generally Legal Profession Practice (Victoria Law Foundation) Act, Acts Vict. No. 7539 (1967) (creating Victoria Law Foundation).

45. See Legal Practitioners Act, 1898-1954, PUB. ACTS N.S.W. No. 22, § 42 (1960), as amended by Stat. N.S.W. No. 29, sec. 7(b) (1967) (New South Wales); Legal Assistance Act, QUEENSL. STAT. No. 67, sec. 10, at 908 (1965), as amended by QUEENSL. STAT. No. 46, sec. 3 (1970) (Queensland); Legal Practitioners Act, 1936-1972, PUB. GEN. ACTS S. AUSTRALIA. §§ 22-24d (1978) (South Australia).

46. See Appendix I, A Comparison of the Key Provisions of the Statutes Relating to Solicitors' Trust Accounts in the Australian States of Victoria, Queensland, South Australia, and New South Wales.

tralia, requires every solicitor to transfer to the applicable legal society or institute an average of between one-third and two-thirds of the lowest balance of the principal of his trust banking account during the preceding statutory period.⁴⁷ The money to be transferred, however, does not include funds which are to be invested according to an arrangement with the client.⁴⁸ Once transferred, the principal may generally be withdrawn upon demand by the solicitor.⁴⁹ The plan further requires that all funds not withdrawn be invested by the applicable law society, with the interest earned accruing to the benefit of a Solicitors' Guarantee Fund and another fund which provides, in part, for legal assistance.⁵⁰ Generally, if the balance of a solicitor's trust bank account falls below a specified sum, the solicitor is not required to transfer funds to the society.⁵¹ Two of the Australian states specifically exempt both the solicitor and the legal society from legal or equitable actions brought by persons as a result of the solicitor's compliance with the applicable statute.⁵²

Although accounting problems with the Australian Plan were at first encountered,⁵³ those individuals associated with the various schemes have reported favorable results.⁵⁴ Since the Australian Constitution contains no due process clause,⁵⁵ no actions have arisen concerning unjust deprivation of property, and no litigation challenging the various statutes of the plan on other grounds appears to have been reported.

47. See Appendix I, § 2. Generally, all money received by a solicitor for or on behalf of another person is to be placed in a trust bank account. See Appendix I, § 1. The following excerpt from the Queensland statutes is an example of statutes requiring solicitors to transfer the corpus of their trust bank accounts.

- (2) . . . every solicitor shall out of the moneys in his trust bank account —
- (a) not later than twenty days after the commencing date deposit with the Society a sum which is not less than two-thirds of the amount which was the lowest balance in his trust bank account on any day during the period of twelve months ending on and including the day immediately preceding the commencing date (herein referred to as "the initial period") or, where he maintains more than one trust bank account, a sum which is not less than two-thirds of the lowest aggregate on any day during the initial period of the balances in his trust bank accounts, excluding any accounts that were maintained for the exclusive benefit of a specific person or specific persons;

Legal Assistance Act, Queensl. Stat. No. 67, sec. 10(2)(a) at 908 (1965), *as amended by* Queensl. Stat. No. 46, sec. 3(c) (1970).

48. See Appendix I, § 3.

49. See Appendix I, § 4.

50. See Appendix I, § 5.

51. See Appendix I, § 6. The specified sum varies among the states from 1,500 £ to 3,000 £ including those funds already transferred to the society. See Appendix I, § 6.

52. The two states are Queensland and South Australia. See Appendix I, § 7.

53. See Dawson, *The Solicitors' Guarantee Fund*, 49 LAW INST. J. 16, 18 (1975).

54. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 803 (Fla. 1978).

55. See 2 A. PEASLEE, CONSTITUTIONS OF NATIONS 32 (rev. 3d ed. 1966).

Canada

The law societies in the various Canadian provinces have also turned to the trust funds of clients as a source for support of legal programs.⁵⁶ Although many of the provinces of Canada did not enact legislation authorizing the use of clients' trust funds for support of legal programs until the 1970's,⁵⁷ most Canadian governments, as well as the legal community within the remainder of the Commonwealth, had taken notice in the early 1960's of the large amounts of interest lost on clients' trust funds left in non-interest-bearing accounts, or demand deposits.⁵⁸ Throughout the Commonwealth it was well-recognized that it would be impractical and too expensive for attorneys to account to each client for interest that could have been earned on the short-term trusts.⁵⁹ As a consequence, attorneys placed such trusts in non-interest-bearing accounts,⁶⁰ unless otherwise directed by the client.⁶¹ Attorneys in many of the Canadian provinces, however, realized that if all of the non-interest-bearing trusts of each attorney or firm were consolidated into one account for each attorney or firm, a minimum average sum would remain constant despite the continual activity of deposits and withdrawals.⁶² This constant sum, in turn, was recog-

56. See Robertson, *The Law Foundation*, 27 *ADVOCATE* 264, 264 (1969) ("an ingenious plan for endowing a foundation to which we can all contribute without it costing us a cent").

57. See Act to amend the Legal Professions Act, B.C. Stat. c.15, sec. 16, § 71 I, at 191 (1969) (amending B.C. REV. STAT. c.214, § 71 (1960)) (British Columbia-first province to enact change); Act to Amend the Barristers and Solicitors Act, N.S. Stat. c. 22, sec. 2, §§ 47-50, at 173-77 (1976) (amending N.S. REV. STAT. c.18 (1967)) (Nova Scotia-most recent province to enact change). Appendix II contains a summary of those statutes in Canadian provinces enacting programs authorizing the use of clients' trust funds to support legal programs. See Appendix II, Comparison of the Key Provisions of the Statutes Relating to Solicitors' Trust Accounts in the Canadian Provinces of Ontario, Alberta, Manitoba, Prince Edwards Island, Nova Scotia, Saskatchewan, and British Columbia. It is reported that the province of New Brunswick has also enacted such a statute. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 803 n.25 (Fla. 1978).

58. See *Brown v. Inland Revenue Comm'rs*, [1964] 3 All E.R. 119, 121-22 (H.L.); *McAfee v. Law Society*, 57 D.L.R. 3d 730, 733 (B.C. Sup. Ct. 1975). See generally Cunningham, *Interest on Solicitors' Mixed Clients' Trusts Accounts*, 25 *ADVOCATE* 145, 145 (1967).

59. See *Brown v. Inland Revenue Comm'rs*, [1964] 3 All E.R. 119, 122 (H.L.); Sadownik, *Interest on Lawyers' Trust Accounts*, 20 *CHITTY'S L.J.* 149, 149 (1972). See generally *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 801 (Fla. 1978) (problem also recognized in Florida); Cunningham, *Interest on Solicitors' Mixed Clients' Trust Accounts*, 25 *ADVOCATE* 145, 145 (1967).

60. See materials cited note 59 *supra*.

61. See Robertson, *The Law Foundation*, 27 *ADVOCATE* 264, 264 (1969). See generally *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 801 (Fla. 1978); Cunningham, *Interest on Solicitors' Mixed Clients' Trust Accounts*, 25 *ADVOCATE* 145, 145 (1967); Sadownik, *Interest on Lawyers' Trust Accounts*, 20 *CHITTY'S L.J.* 149, 149 (1972). An attorney-trustee could validly assume no client would direct his short-term trust funds to be invested if he knew that his attorney's fees would thereby be increased in excess of the earnings. Cf. *State ex rel. Torrence v. Davidson*, 92 N.C. 408, 410-11(1885) (trustee should enforce choses in action, debts, and demands unless enforcement would cause loss).

62. See Cunningham, *Interest on Solicitors' Mixed Clients' Trust Accounts*, 25 *ADVOCATE*

nized as a base from which interest income could be generated and economically calculated.⁶³

As a result of these discoveries, law societies throughout Canada in the late 1960's began to make efforts to enact legislation whereby these non-interest-bearing trusts could be put to use.⁶⁴ Initially, banks, unlike trust companies, did not welcome the legislation since the banks would no longer have free use of funds in the numerous non-interest-bearing trust accounts.⁶⁵ The banks were finally appeased, however, when legal societies agreed that interest would have to be paid only on the designated minimum or average balance of each attorney's or firm's trust savings account.⁶⁶ Although the agreement for the payment of interest solely on a designated minimum balance was not included in the applicable statutes of the provinces,⁶⁷ except those of Saskatchewan,⁶⁸ the use of the designated average or minimum balance is common.⁶⁹

The statutes concerning lawyers' trust accounts enacted in the various provinces of Canada are almost identical⁷⁰ and may be referred to as the "Canadian Plan." Unlike the Australian Plan, the procedure used in Canada does not require any of the corpus of the trust to be transferred to the law society.⁷¹ In Canada the solicitor retains possession and control of the entire trust.⁷² All funds held for or on behalf of a client and not immedi-

145, 145 (1967); Sadownik, *Interest on Lawyers' Trust Accounts*, 20 CHITTY'S L.J. 149, 149-51 (1972). See generally Robertson, *The Law Foundation*, 27 ADVOCATE 264, 264 (1969).

63. See materials cited note 62 *supra*.

64. See Cunningham, *Interest on Solicitors' Mixed Clients' Trust Accounts*, 25 ADVOCATE 145, 145 (1967) (British Columbia); Sadownik, *Interest on Lawyers' Trust Accounts*, 20 CHITTY'S L.J. 149, 150-51 (1972) (Alberta).

65. See Robertson, *The Law Foundation*, 27 ADVOCATE 264, 264 (1969).

66. See *id.* at 264.

67. See Appendix II, § 3.

68. See Appendix II, n.33.

69. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 803 (Fla. 1978). See generally Cunningham, *Interest on Solicitors' Mixed Clients' Trust Accounts*, 25 ADVOCATE 145, 145 (1967) (Victoria); Robertson, *The Law Foundation*, 27 ADVOCATE 264, 264 (1969) (British Columbia); Sadownik, *Interest on Lawyers' Trust Accounts*, 20 CHITTY'S L.J. 149, 151 (1972) (Alberta).

70. See Appendix II. The statutes of the Australian states are not as similar as are the statutes in the provinces of Canada. Compare Act to Amend the Law Society Act, Ont. Stat. c.49, sec. 3 (1973) (amending ONT. REV. STAT. c. 38, § 51 (1970)) (Ontario, Canada) and Legal Profession Amendment Act, Alta. Stat. c. 114, sec. 7 (1972) (amending ALTA. REV. STAT. c.203 (1970)) (Alberta, Canada) with Legal Profession Practice (Amendment) Act, Acts Vict. No. 7226, sec. 6 (1964), as amended by Acts Vict. No. 8954, sec. 40 (1976) (amending VICT. STAT. No. 6291, § 40 (1958)) (Victoria, Australia) and Legal Assistance Act, Queensl. Stat. No. 67, sec. 10 (1965), as amended by Queensl. Stat. No. 46, sec. 3(c) (1970) (Queensland, Australia).

71. Compare Appendix I, § 2 (Australian Plan requiring transfer of corpus) with Appendix II, §§ 3 & 4 (Canadian Plan requiring corpus to be placed in trust account and only interest transferred).

72. See Appendix II, § 3. See generally Cunningham, *Interest on Solicitors' Mixed Clients' Trust Accounts*, 25 ADVOCATE 145, 145 (1967) (Victoria); Sadownik, *Interest on Lawyers' Trust Accounts*, 20 CHITTY'S L.J. 149, 149-51 (1972) (Alberta).

ately invested are to be placed in an interest-bearing trust account,⁷³ except in Saskatchewan where trust funds need not be so placed if the balance of the solicitor's trust account drops below \$5,000.⁷⁴ All interest earned on the funds placed in the interest-bearing account is to be remitted to the law foundation,⁷⁵ unless there is a written agreement between the solicitor and his client concerning the disposition of such interest or unless the client directs that his funds be held in a separate account and not be deposited in the attorney's trust savings account.⁷⁶

Under the Canadian Plan, solicitors in all but one of the provinces are not required to advise their clients that they have a right to earn interest on their trust funds and that such funds will, otherwise, be invested for the benefit of the law society.⁷⁷ Although this is contrary to any notion of due process recognized in the United States,⁷⁸ Canadian citizens are not protected by such a due process guarantee.⁷⁹ Furthermore, under the Canadian Plan, solicitors complying with the relevant statutes cannot incur any liability to their clients, either as solicitors or as trustees, for failing to account to them for the interest on their trust funds that accrues to the law society.⁸⁰ Although participation in the Canadian Plan is now mandatory in all the applicable provinces,⁸¹ until 1974 solicitors in British Columbia were not required to place all non-interest-bearing trust funds in ac-

73. See Appendix II, § 3.

74. See Act to amend The Legal Profession Act, Sask. Stat. c. 55, sec. 4, §§ (1A) - (1C), at 204-05 (1973) (amending SASK. REV. STAT. c. 301, § 44 (1965), as amended by Sask. Stat. c.22, sec. 3 (1971)).

75. See Appendix II, § 4. In Manitoba, however, the funds are remitted to the Minister of Finance. Act to Amend the Law Society Act, Man. Stat. c.55, sec. 3, § 30.2(2), at 322 (1972) (amending MAN. REV. STAT. c.L100, § 30 (1970)).

76. See Appendix II, § 5.

77. See Appendix II, § 5. In Nova Scotia, however, a lawyer who believes that his client's funds will be on deposit for more than thirty days has a duty to inform his client of his right to earn interest on such funds. See Act to Amend the Barristers and Solicitors Act, N.S. Stat. c.22, sec. 2, § 50(3), at 177 (1976).

78. It is well-settled in the United States that a government cannot take private property without affording the owner both procedural and substantive due process. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 379-80 (1971) (substantive); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (procedural); *Keating v. State ex rel. Ausebel*, 173 So. 2d 673, 677 (Fla. 1965) (substantive and procedural). See generally U.S. CONST. amends. V & XIV.

79. See 4 A. PEASLEE, CONSTITUTIONS OF NATIONS 207 (rev. 3d ed. 1970). Although Canada enacted a bill of rights in 1960 recognizing the right of a person not to be deprived of property without due process of law, that bill of rights is not a guarantee but serves only as an influence on Parliament. See *id.* at 207, 237.

80. See Appendix II, § 6.

81. See Appendix II, § 3. The province of Saskatchewan provides one exception. When the sum of trust funds of all clients falls below \$5,000, an attorney need not deposit the funds in an interest-bearing account. See Act to amend the Legal Profession Act, Sask. Stat. c.55, sec. 4, §§ (1A) - (1C), at 204-05 (1973) (amending SASK. REV. STAT. c.301, § 44 (1965), as amended by Sask. Stat. c.22, sec. 3 (1971)).

counts to earn interest on behalf of the law society.⁸²

The same acts which authorized the use of clients' general trust funds for the benefit of legal programs also created the law foundations in each of the participating provinces except Manitoba.⁸³ All the foundations were created with the objective of using the revenue generated from clients' trust funds for legal education, research, and legal aid to the public.⁸⁴ One-half of the provinces also authorized the use of this revenue for the establishment, operation, and maintenance of law libraries,⁸⁵ and other provinces dedicated revenue for the reform of laws.⁸⁶ Apparently, however, the use of the funds was a controversial issue in some of the provinces, eliciting queries of possible conflicts of interest and ventures into areas which were believed to be the responsibility of government.⁸⁷ Concern was expressed by some attorneys that projects such as creation, operation, and maintenance of libraries were questionable as being programs primarily benefiting "lawyers as a class," thereby creating a possible conflict of interest.⁸⁸ Some legal scholars concluded that legal aid was the responsibility of the Canadian governments, and not the law societies, whereas other scholars found that the most important use of the funds by the law societies was the support of legal aid.⁸⁹

The Canadian Plan is apparently a success as no disabling problems, either legal or administrative, have been reported.⁹⁰ In fact, the authority of one province's law society to promulgate additional rules concerning solicitors' trust accounts has been upheld in court.⁹¹ Furthermore, in British Columbia, the Law Foundation is receiving over two million dollars annually from earnings on clients' trust funds maintained by attorneys,⁹²

82. See *McAfee v. Law Society*, 57 D.L.R. 3d 730, 734 (B.C. Sup. Ct. 1975); Act to amend the Legal Professions Act, B.C. Stat. c.49, sec. 2 (a)(1)(k), at 266 (1974) (amending B.C. Rev. Stat. c.214, § 37 (1960), as amended by B.C. Stat. c. 15, sec. 6 (1969)). Prior to enactment of the statutory requirement of participation, the law society of British Columbia adopted rules requiring solicitors' participation for trust accounts with balances exceeding \$5,000. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 804 (Fla. 1978).

83. See Appendix II, § 1.

84. See Appendix II, § 2.

85. See Appendix II, § 2.

86. See Appendix II, § 2.

87. See Robertson, *The Law Foundation*, 27 *ADVOCATE* 264, 265 (1969); Sadownik, *Interest on Lawyers' Trust Accounts*, 20 *CHERRY'S L.J.* 149, 150 (1972).

88. See Robertson, *The Law Foundation*, 27 *ADVOCATE* 264, 265 (1969).

89. Compare Robertson, *The Law Foundation*, 27 *ADVOCATE* 264, 265 (1969) ("law reform and legal aid, are properly the responsibility of the provincial government") with Sadownik, *Interest on Lawyers' Trust Accounts*, 20 *CHERRY'S L.J.* 149, 150-51 (1972) (legal aid is most important project of law society).

90. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 803-04 (Fla. 1978).

91. See *McAfee v. Law Society*, 57 D.L.R. 3d 730, 734-35 (B.C. Sup. Ct. 1975).

92. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 804 (Fla. 1978) (citing Law Foundation of British Columbia, Annual Report for the fiscal year ending April 30, 1976).

a substantial increase from the first year of the plan when it was voluntary.⁹³

Africa

Although it has been reported that the countries of South-West Africa, Rhodesia, and the Republic of South Africa have interest-bearing trust plans,⁹⁴ only the system developed in the Republic of South Africa will be reviewed. The law of trusts in South Africa is unlike the common-law structure of trusts found in England and different from the fiduciary systems of civil-law countries, in which "the words 'trust' and 'trustee'" are not found in law.⁹⁵ In South Africa the relationship between an attorney, as trustee, and his client, as trustor or beneficiary, "is one of debtor and creditor."⁹⁶ Accordingly, unlike a common-law country such as England, the client has "no right to follow trust assets" if the attorney has appropriated or misused them;⁹⁷ in fact, the client is relegated to the same status as an unsecured creditor.⁹⁸ Although an attorney has a duty to invest his clients' trust funds under the common-law in South Africa,⁹⁹ until 1964 once funds were placed in a trust savings account, they could only be withdrawn to meet the obligations of the trust.¹⁰⁰ Finally, in 1964 statutes were passed permitting the withdrawal of funds for the purpose of investment.¹⁰¹

These same statutes also provide for what may be called the "South African Plan."¹⁰² Unlike both the Australian and Canadian plans, the system in South Africa is not mandatory.¹⁰³ An attorney need not place his clients' funds in his trust savings account, even if he is not going to invest the funds.¹⁰⁴ In fact, very little incentive exists for an attorney to maintain

93. In the first year only \$50,000 was produced. See *In re* Interest on Trust Accounts, a Petition of the Florida Bar, 356 So. 2d 799, 804 (Fla. 1978).

94. See *In re* Interest on Trust Accounts, a Petition of the Florida Bar, 356 So. 2d 799, 803 n.25 (Fla. 1978).

95. Silberberg, Book Review, 1977 1 RHODESIAN L.J. 98, 98 (T. HONORÉ, THE SOUTH AFRICAN LAW OF TRUSTS).

96. *Id.* at 98.

97. See *id.* at 98.

98. See *id.* at 98.

99. See T. HONORÉ, THE SOUTH AFRICAN LAW OF TRUSTS 217 (2d ed. 1976).

100. See *id.* at 244.

101. See *id.* at 245. See generally Attorneys, Notaries, and Conveyancers Admission Act of 1934, STAT. OF REP. S. AFR. § 33(2), at 165(2) (1978).

102. See generally Attorneys, Notaries, and Conveyancers Admission Act of 1934, STAT. OF REP. S. AFR. § 33 (1978).

103. See *id.* § 33(2)(a), at 165(2).

104. See T. HONORÉ, THE SOUTH AFRICAN LAW OF TRUSTS 245 (2d ed. 1976). It may be argued, however, that an attorney has a duty to place uninvested funds in a savings trust account because the client or his beneficiaries have a possible interest in the soundness of the equivalent of a clients' security fund. See *id.* at 245. See generally Attorneys' Admission

large deposits in trust savings accounts, because all interest accruing on the principal must be remitted to the equivalent of a clients' security fund.¹⁰⁵ This provision, whereby interest must be remitted to the clients' security fund, is the sole basis of the South African Plan, and in light of its limited scope, bar associations in the United States are unlikely to use this plan as a model for their proposals of trusts savings accounts.

THE FLORIDA PLAN

Background

The March, 1978 decision of the Florida Supreme Court authorizing attorneys to invest clients' non-interest-bearing trust funds for the benefit of legal programs was the culmination of work started by the Florida Bar in 1971.¹⁰⁶ The plan adopted by the Florida court required the amendment of Florida's Integration Rule¹⁰⁷ and the Code of Professional Conduct.¹⁰⁸

Rule 11.02(4) of the Integration Rule is specifically directed to duties of an attorney concerning money or other property entrusted to him by a client.¹⁰⁹ The rule, in part, provides that money held by an attorney for a client must be used only for the purposes designated by the client, that such money is not subject to setoff for the attorney's fees, and that refusal to account for and deliver to the client his money upon demand constitutes conversion.¹¹⁰ The rule further requires attorneys to maintain detailed accounting records as may be requested by the bar¹¹¹ and to comply with Disciplinary Rule 9-102 of the Florida Code of Professional Responsibility.

Amendment and Legal Practitioners' Fidelity Fund Act of 1941, STAT. OF REP. S. AFR. §§ 1-41 (1978) (creating a clients' security fund).

105. See Attorneys, Notaries, and Conveyancers Admission Act of 1934, STAT. OF REP. S. AFR. § 33(3), at 162(2)-(3) (1978). See generally T. HONORÉ, *THE SOUTH AFRICAN LAW OF TRUSTS* 245 (2d ed. 1976).

106. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 800 (Fla. 1978).

107. Integration is the "act of organizing the bar of a state into an association, membership in which is a condition precedent to the right to practice law." BLACK'S LAW DICTIONARY 946 (rev. 4th ed. 1968). See, e.g., *In re Integrating the Bar*, 259 S.W. 2d 144, 145 (Ark. 1953); *In re Integration of State Bar*, 95 P.2d 113, 114 (Okla. 1939); *Integration of Bar Case*, 11 N.W.2d 604, 608 (Wis. 1943).

108. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 807-11 (Fla. 1978). Under the Florida Constitution, the Florida Supreme Court has exclusive jurisdiction to regulate the discipline of attorneys. See FLA. CONST. art. V, § 15.

109. See FLA. STAT. ANN., Integration Rule 11.02(4) (West Supp. 1968-1978).

110. See *id.* The accounting requirements do not appear onerous, but the failure to comply with them can result in an attorney being audited at his expense by the Florida Bar. See *id.* Failure to comply with accounting requirements could even lead to disciplinary actions. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 801 (Fla. 1978). It appears that these accounting procedures are specifically aimed at a problem in Florida; approximately 56% of all the disciplinary actions against attorneys in Florida from 1970 to 1977 pertained to problems with trust accounts. See *id.* at 801 n.17.

111. See FLA. STAT. ANN., Integration Rule 11.02(4)(b),(c) (West Supp. 1968-1978).

ity.¹¹² Disciplinary Rule 9-102¹¹³ prohibits an attorney from commingling a client's funds with his own except in two circumstances¹¹⁴ and requires an attorney to perform specific functions concerning the client's property.¹¹⁵ These regulations imposed upon attorneys have been interpreted by the American Bar Association Committee on Ethics and Professional Responsibility to prohibit an attorney from investing and deriving income from a client's funds, even if for the purpose of defraying operating expenses, unless the client has specifically authorized such a procedure.¹¹⁶

The same circumstances that led to the creation of the Australian and Canadian plans¹¹⁷ also led to the action by the Florida Bar—the need for money to support legal programs and a readily available source from which to derive such funds. The initial motive of the Florida Bar in proposing the use of non-interest-bearing trusts of clients was to develop a revenue source for the clients' security fund, and not until 1977 did the bar seek funding for other legal programs.¹¹⁸ Like the legal societies and courts of the Commonwealth,¹¹⁹ the Florida Bar was aware that substantial sums of clients' trust funds were left idle in demand deposits.¹²⁰ As the Florida Supreme Court recognized, when relatively small, short-term trusts are placed with attorneys, it is impractical for attorneys to invest clients' funds and adequately report earnings, even if only for deposits in savings accounts.¹²¹

112. *See id.* § (4)(a),(b).

113. FLA. STAT. ANN., Code of Professional Responsibility DR 9-102 (West Supp. 1968-1978). This disciplinary rule is identical to that of the American Bar Association and that of Texas. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1968); State Bar of Texas, Rules and Code of Professional Responsibility DR 9-102 (1973).

114. An attorney may deposit funds of the client in his own account to pay bank charges on the client's account, and if the client's funds belong in part to the attorney, those funds may be withdrawn when due unless disputed by the client. *See* FLA. STAT. ANN., Code of Professional Responsibility DR 9-102(A) (West Supp. 1968-1978).

115. *See* FLA. STAT. ANN., Code of Professional Responsibility DR 9-102(B) (West Supp. 1968-1978). One of the functions is that the attorney must promptly pay his client the funds on deposit upon the client's request. *See id.* DR 9-102(B)(4).

116. *See* 1 ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, Nos. 545 (1962) & 991 (1967).

117. *See* notes 40-42 & 56 *supra* and accompanying text.

118. *See In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 804 n.32 (Fla. 1978).

119. *See Brown v. Inland Revenue Comm'rs*, [1964] 3 All E.R. 119, 122 (H.L.); Cunningham, *Interest on Solicitors' Mixed Clients' Trust Accounts*, 25 ADVOCATE 145, 145 (1967); Sadownik, *Interest on Lawyers' Trust Accounts*, 20 CHITTY'S L.J. 149, 149 (1972).

120. *See In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 801 (Fla. 1978). According to the opponents of the bar's proposal, this was a conclusion reached without support. *See id.* at 805.

121. *See id.* at 801-02. Even if an attorney were to place all his clients' small trusts in one savings account, the problem of allocating interest would require an excessive amount of time and very close coordination with the bank. *See id.* at 801 n.18; *Brown v. Inland Revenue Comm'rs*, [1964] 3 All E.R. 119, 122 (H.L.); Sadownik, *Interest on Lawyers' Trust Accounts*, 20 CHITTY'S L.J. 149, 149 (1972). The problems faced by a law firm with three hundred

Such recognition by the court, however, did not mean that an attorney was no longer obligated to use his discretion in determining whether to invest his clients' funds strictly for their benefit.¹²² Consequently, if a trust was obviously of adequate size and duration to be invested economically for the benefit of the client, an attorney placing all of the clients' funds in accounts for the benefit of the bar's programs would be in breach of his fiduciary duty.¹²³ When, however, a number of small accounts cannot be economically invested, they can be aggregated, and without the requirements of accounting to each client the net income will be substantial.¹²⁴ It is this interest income that the Bar of Florida sought to dedicate to public legal programs, the clients' security fund, and other bar-related needs.¹²⁵

Obstacles to the Florida Plan

The most significant obstacles to the implementation of the Florida Plan were the federal and state banking regulations.¹²⁶ Federal statutes and regulations prohibit the payment of interest upon any demand or checking account.¹²⁷ As a consequence, the Florida Bar was limited to using savings

clients, all of whom at one time or another during the year place small sums of money in the firm's trust, could be staggering. For example, on a random morning 22 clients could have deposits with the firm, but by that evening eight clients could have withdrawn some or all of their funds and 15 clients could have placed or added funds. The accounting problems and the problems of coordination with the bank in determining which clients were to be credited with interest that day and on what balance would probably be more than a headache for most firms.

A further problem would be the actual payment of interest to the client withdrawing all his funds, when banks make interest payments on a quarterly basis. The futility of requiring every trust to be deposited in savings accounts is more readily apparent when one recognizes that the interest earned on some trusts might not even pay for the postage to mail the earnings. If, for some reason, an attorney held \$100 for a client for seven days and assuming a six percent return on a savings account, the interest earned would not even amount to 12 cents ($\$100 \times 6\% \times 7 \text{ days}/365 \text{ days}$).

122. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 779, 807 (Fla. 1978).

123. It is the duty of the trustee to invest productively the funds of the trust unless the trust money is to be applied immediately or within a short time. See *Langford v. Shamburger*, 417 S.W.2d 438, 444-45 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.); *Moore v. Sanders*, 106 S.W.2d 337, 339 (Tex. Civ. App.—San Antonio 1937, no writ). Failure to fulfill this duty is a breach of trust. See, e.g., *First Nat'l Bank v. McGuire*, 184 F.2d 620, 625 (7th Cir. 1950); *Gibson County v. Fourth & First Nat'l Bank*, 96 S.W.2d 184, 192 (Tenn. Ct. App. 1936); *Republic Nat'l Bank & Trust Co. v. Bruce*, 130 Tex. 136, 140, 105 S.W.2d 882, 885 (1937).

124. If, for example, the average balance of all the small accounts for an attorney totalled \$10,000, a six percent interest rate would yield a sum of \$600 during a period of one year.

125. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 804-05 (Fla. 1978).

126. See *id.* at 801-02.

127. See 12 U.S.C. § 371a (1970); 12 C.F.R. § 217.2(a) (1978) (part of Regulation Q of Federal Reserve Board); *id.* § 329.2(a) (part of regulations promulgated by Federal Deposit Insurance Cooperation). Interest payments are prohibited on demand deposits because banks

accounts. Use of savings accounts also presented a problem, as both federal and state regulations inhibited the withdrawal of funds upon demand by the depositor.¹²⁸ Banks are given the right to require at least a thirty-day notice before funds are withdrawn, in part or in full.¹²⁹ This right to notice created a potential conflict for an attorney in Florida because under the Florida Integration Rule and the Code of Professional Responsibility, an attorney must repay the funds entrusted to him upon demand of his client.¹³⁰ Furthermore, savings accounts, whether with banks or savings and loan associations, cannot be drawn upon by anyone other than the depositor,¹³¹ subject to a few exceptions.¹³² Accordingly, federal regulations prohibit savings deposits from being subject to negotiable orders of withdrawals (NOW),¹³³ except in seven northeastern states.¹³⁴ A NOW account is a hybrid of the traditional checking account, also known as a demand account,¹³⁵ and the traditional savings account.¹³⁶ The NOW account is

in competing for demand deposits would probably reduce reserve levels to a point such that the banks could not cover an unexpected rise in withdrawals. See Comment, *The Negotiable Order of Withdrawal (NOW) Account: "Checking Accounts" for Savings Banks?*, 14 B.C. INDUS. & COM. L. REV. 471, 479 (1973). Consequently, failure to pay upon demand defeats the very purpose of demand deposits and subjects the bank and all demand depositors to a substantial risk if there is a sudden run on the bank. *Id.* at 479.

128. See FLA. STAT. ANN. § 654.02 (West 1966); 12 C.F.R. § 217.1(e)(2)(1978).

129. See FLA. STAT. ANN. § 654.02 (West 1966); (sixty-day notice may be required); 12 C.F.R. § 217.1(e)(2)(1978) (thirty-day notice may be required).

130. Compare 12 C.F.R. § 217.1(e)(2)(1978) (bank has right to thirty-day notice) and FLA. STAT. ANN. § 654.02 (West 1966) (bank has right to sixty-day notice) with FLA. STAT. ANN., Integration Rule 11.02(4) (West Supp. 1968-1978) (attorney must pay upon client's demand) and FLA. STAT. ANN., Code of Professional Responsibility DR 9-102 (B)(4) (West Supp. 1968-1978) (attorney must pay upon client's demand).

131. See 12 C.F.R. §§ 217.5(c)(1), 329.5(c)(1) & 545.4-1(a)(1)(1978).

132. See 12 C.F.R. §§ 217.5(c)(1)(i)-(vii), 329.5(c)(1)(i)-(vi) & 545.4-1(a)(3)(1978), as amended by 43 Fed. Reg. 5340 (1978). Interest earned on the savings deposit may be paid to a third party by the bank upon written instruction from the depositor. See 12 C.F.R. § 217.5(c)(1)(vi) (1978).

133. See 12 U.S.C. § 1832(a)(Supp. V 1975), as amended by State Taxation of Depositories Act of 1976, Pub. L. No. 94-222, § 2, 90 Stat. 197 (1976) (adding Connecticut, Rhode Island, Maine, and Vermont) and Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 1301, 92 Stat. 3712 (1978) (adding New York).

134. The seven states exempted by these same laws are: Massachusetts, Connecticut, Rhode Island, Maine, Vermont, New York, and New Hampshire. See 12 U.S.C. § 1832(a) (Supp. V 1975), as amended by State Taxation of Depositories Act of 1976, Pub. L. No. 94-222, § 2, 90 Stat. 197 (1976) and Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 1301, 92 Stat. 3712 (1978). A program similar to NOW accounts in banks is authorized for federal credit unions. See 12 C.F.R. § 701.34 (1978), as amended by 43 Fed. Reg. 5359 (1978) (delay of effective date to March 8, 1978). Federal credit unions may provide their members with share drafts which may be withdrawn from share draft accounts in negotiable or non-negotiable form. *Id.* § 701.34(a) & (b). The Florida Bar did not request the right to place client trust funds in credit unions of which attorneys are members. See generally *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799 (Fla. 1978).

135. The term check is defined as "any draft drawn on a bank and payable on demand."

similar to a checking account because a draft drawn on a NOW account is negotiable and may be transferred freely to third parties.¹³⁷ Negotiable orders of withdrawal are similar in appearance and legal standing to a check and move through the banking and financial system as would any check drawn on a demand deposit.¹³⁸ Unlike demand deposits, however, NOW accounts earn interest and in that respect resemble savings accounts.¹³⁹ Despite the inability of financial institutions in Florida to use NOW accounts,¹⁴⁰ the Florida Supreme Court was able to develop a plan that on its face does not create a conflict for attorneys.¹⁴¹

The Plan Adopted by the Florida Supreme Court

The plan adopted by the Florida Supreme Court is a voluntary program.¹⁴² Any attorney, however, who does elect to participate in the program must, at his discretion, invest his client's funds for the benefit of the client "when appropriate."¹⁴³ The earnings of funds not invested for the benefit of clients are to be remitted to the Florida Bar Foundation, Inc.,¹⁴⁴

12 C.F.R. § 210.2(b)(1978). It is therefore logical that any account on which a person could draw drafts would be called a checking account. Furthermore, since the checks must be paid on demand, the checking account is also called a demand account.

136. See Kaplan, *Federal Legislative and Regulatory Treatment of NOW Accounts*, 91 BANKING L.J. 439, 449-54 (1974); Comment, *The Negotiable Order of Withdrawal (NOW) Account: "Checking Accounts" for Savings Banks?*, 14 B.C. INDUS. & COM. L. REV. 471, 492-99 (1973).

137. See Comment, *The Negotiable Order of Withdrawal (NOW) Account: "Checking Accounts" for Savings Banks?*, 14 B.C. INDUS. & COM. L. REV. 471, 472 (1973).

138. See Kaplan, *Federal Legislative and Regulatory Treatment of NOW Accounts*, 91 BANKING L.J. 439, 449-54(1974); Comment, *The Negotiable Order of Withdrawal (NOW) Account: "Checking Accounts" for Savings Banks?*, 14 B.C. INDUS. & COM. L. REV. 471, 492-99 (1973).

139. Savings accounts subject to negotiable orders of withdrawal may earn up to five percent interest. See 12 C.F.R. §§ 217.7(c), 329.6(c), 329.7 (b)(1)(ii); 43 Fed. Reg. 46846 (1978) (to be codified in 12 C.F.R. § 526.8(a)).

140. See 12 U.S.C. § 1832(a)(Supp. V 1975), *as amended by State Taxation of Depositories Act of 1976*, Pub. L. No. 94-222, § 2, 90 Stat. 197 (1976) *and Financial Institutions Regulatory and Interest Rate Control Act of 1978*, Pub. L. No. 95-630, § 1301, 92 Stat. 3712 (1978) (all but seven states prohibited from using NOW accounts).

141. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 809-11 (Fla. 1978).

142. See *id.* at 809. The proposal by the bar, however, included a caveat that the program would remain voluntary only until federal laws and regulations were amended to allow either interest to be paid on checking accounts or negotiable orders of withdrawals to be drawn on savings accounts in Florida. See *id.* at 804.

143. *Id.* at 807. Although the words "when appropriate" are not defined in the court's opinion, it is a general rule that a trustee must invest the funds he holds in trust when such funds are not to be repaid within a very short time. See *Langford v. Shamburger*, 417 S.W.2d 438, 444-45 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.); *Moore v. Sanders*, 106 S.W.2d 337, 339 (Tex. Civ. App.—San Antonio 1937, no writ).

144. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 807, 810 (Fla. 1978). The Foundation was authorized by article XII of the Integration Rule.

which will allocate the funds to support various programs of the bar, the foundation, and Florida Legal Services, Inc.¹⁴⁵ The programs of these three entities have the following purposes:

- (a) to provide legal aid to the poor;
- (b) to provide for the adequate delivery of legal services to all members of the public;
- (c) to augment the clients' security fund with a view toward full reimbursement;
- (d) to fund a more expeditious and efficient grievance mechanism;
- (e) to provide student loans;
- (f) to improve the administration of justice; and
- (g) for such other programs for the benefit of the public as are specifically approved by the Court from time to time.¹⁴⁶

The plan adopted by the court is embodied in a new section of the Integration Rule.¹⁴⁷ This new section provides that an attorney may establish a trust savings account in any bank or savings and loan association that meets certain criteria.¹⁴⁸ Since clients' funds must be subject to immediate withdrawal, deposits may not be made in any institution that has enforced its right to require a thirty or sixty-day notice within the last five years.¹⁴⁹ Once funds are deposited in an eligible depository, if that institution exercises its right to require notice, the institution becomes ineligible, and attorneys whose trust savings accounts are affected must immediately notify the Florida Bar Foundation.¹⁵⁰ If, in the interval before the funds can be withdrawn, a client demands his funds, the rule further provides that an attorney may certify to the Foundation the sum needed to meet the client's emergency needs.¹⁵¹ The Foundation, at its discretion, may then

See FLA. STAT. ANN., Integration Rule art. XII (West 1967). The court's order also required the board of directors of the Foundation to be expanded to include as permanent board members the Chief Justice of the Florida Supreme Court, two other judicial officers, the president of the Florida Bar, and the chairman of Florida Legal Services, Inc. *See In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 811 (Fla. 1978). Furthermore, the court ordered the charter of the Foundation to be changed to reflect the purposes of the plan. *See id.* at 811.

145. *See In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 805 (Fla. 1978). Florida Legal Services, Inc. is a nonprofit operation that organizes and funds legal service programs for the poor throughout Florida. *See id.* at 805 n.34.

146. *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 811 (Fla. 1978).

147. *See id.* at 809-11. Various other amendments made to the Integration Rule and Code of Professional Responsibility authorized attorneys to deposit trust funds with savings and loan associations, a function previously reserved only to banks. *See id.* at 807-09.

148. *See id.* at 809 (to be codified in Integration Rule 11.02(4)(d)(i)). The institution may be one authorized by either state or federal law but must be insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation. *See id.* at 809.

149. *See id.* at 809 (to be codified in Integration Rule 11.02(4)(d)(ii)).

150. *See id.* at 809 (to be codified in Integration Rule 11.02(4)(d)(iii)).

151. *See id.* at 809 (to be codified in Integration Rule 11.02(4)(d)(iv)).

advance to the attorney funds to meet all or part of the client's emergency needs.¹⁵² If an advance is made, the attorney must direct the institution holding his client's funds to remit to the Foundation an amount equal to the advance as soon as the deposit may be withdrawn.¹⁵³ The rule also requires that the trust savings accounts earn a rate of interest that is equal to or exceeds the rate paid on regular savings accounts.¹⁵⁴ Eligible depository institutions are to calculate interest on the deposits based on the "average monthly balance" and remit such interest directly to the Foundation.¹⁵⁵

Attorneys electing this program are further required to mail to each client for whom they hold trust funds a copy of a notice given in the rule.¹⁵⁶ The notice explains why attorneys place certain trust funds in demand deposits and why a client cannot expect to earn interest on small, short-term trusts.¹⁵⁷ It informs the client, however, how his funds can be used to help satisfy the objectives of the court's plan.¹⁵⁸ The form stipulates that the client's funds will be placed in an interest-bearing trust account with interest accruing to the Foundation, unless he "specifically" gives his attorney "written instructions to the contrary."¹⁵⁹ The notice further explains that if the client chooses not to permit his funds to be placed in a trust savings account for the benefit of the Foundation, his funds will be placed in demand deposits from which he will not realize any income.¹⁶⁰

A CRITICISM OF THE FLORIDA PLAN

Due Process

It is well-settled that the state cannot take private property without affording the owner both procedural and substantive due process.¹⁶¹ At first

152. *See id.* at 809-10 (to be codified in Integration Rule 11.02(4)(d)(iv)(A)).

153. *See id.* at 810 (to be codified in Integration Rule 11.02(4)(d)(iv)(B)).

154. *See id.* at 810 (to be codified in Integration Rule 11.02(4)(d)(v)).

155. *See id.* at 810 (to be codified in Integration Rule 11.02(4)(d)(vi)(A)).

156. *See id.* at 810 (to be codified in Integration Rule 11.02(4)(d)(vii)).

157. *See id.* at 810-11 (to be codified in Integration Rule 11.02(4)(d)(vii)).

158. *See id.* at 811 (to be codified in Integration Rule 11.02(4)(d)(vii)).

159. *See id.* at 811 (to be codified in Integration Rule 11.02(4)(d)(vii)).

160. *See id.* at 811 (to be codified in Integration Rule 11.02(4)(d)(vii)).

161. *See, e.g.,* *Boddie v. Connecticut*, 401 U.S. 371, 379-80 (1971) (substantive); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (procedural); *Keating v. State ex rel. Ausebel*, 173 So. 2d 673, 677 (Fla. 1965) (substantive and procedural). *See generally* U.S. CONST. amends. V & XIV; FLA. CONST. art. 1, § 9. Procedural due process requires that a person must be given notice of the proceeding against him, that he must be given an opportunity to defend himself, and that the propriety of the deprivation must be resolved in a manner consistent with fairness. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Substantive due process may be defined generally as the constitutional guarantee that no person shall be deprived of life, liberty, or property for arbitrary reasons, whether by unreasonable legislation, or legislation unreasonably applied. *See, e.g.,* *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Missouri Pac. Ry. v. Humes*, 115 U.S. 512, 519-20 (1885).

reading the order of the Florida Supreme Court may appear to conflict with these constitutional guarantees, as clients are denied the right to earn interest for their own benefit from their small, short-term trust accounts.¹⁶² To assert a due process claim, a client would have to show that he possessed a specific property right¹⁶³ and that he, in fact, had been unjustly deprived of such property right.¹⁶⁴ The immediate question, however, of a due process violation concerning the Florida plan is averted because the plan requires an attorney to obtain his client's consent before the client's funds can be placed in savings accounts for the benefit of various legal programs.¹⁶⁵

The plan, however, is still open to serious constitutional question. Although an individual may waive many of his constitutional rights,¹⁶⁶ such a waiver must be made knowingly, voluntarily, and intelligently¹⁶⁷ and will not be presumed by the courts.¹⁶⁸ The method under the Florida plan by which attorneys are to obtain their clients' consent or waiver is difficult to reconcile with the principle of knowing, voluntary, and intelligent waiver.¹⁶⁹ The court assumes that a client has knowingly waived his constitutional right to due process simply because he was mailed a rather vague

162. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 811 (Fla. 1978).

163. See *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 88 (1891). Property rights extend beyond the mere "thing" and include the rights to acquire, use, and dispose of property. See *Terrace v. Thompson*, 263 U.S. 197, 215 (1923); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

164. See, e.g., *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 341-42 (1969) (wages unjustly deprived when frozen in garnishment proceedings); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (unjust deprivation of right to devote land to legitimate use); *Henkels v. Sutherland*, 271 U.S. 298, 301-02 (1926) (unjust deprivation of earnings from proceeds of land wrongfully confiscated and sold).

165. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 810-11 (Fla. 1978).

166. See, e.g., *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972) (rights to prejudgment notice and hearing); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) (rights to notice and hearing prior to a civil judgment); *Evans v. Hillsborough County*, 186 So. 193, 196 (Fla. 1938) (right to challenge statute depriving individual of real property).

167. See, e.g., *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972); *Brady v. United States*, 397 U.S. 742, 748 (1970); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

168. See, e.g., *Smith v. United States*, 337 U.S. 137, 150 (1949) (privilege against self-incrimination); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (right to trial by jury); *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 307 (1937) (right to object to actions of administrative agencies).

169. Compare *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 810-11 (Fla. 1978) (notice mailed by attorney to client and no objection thereto by client assumed to be waiver) with *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972) (waiver must be made knowingly, voluntarily, and intelligently) and *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 307 (1937) (courts do not presume waiver of constitutional rights).

notice, and he has not objected.¹⁷⁰ There is no requirement of showing that the client even received the notice,¹⁷¹ and, therefore, no basis whatsoever for holding that a client voluntarily and intelligently waived his constitutional rights to due process.¹⁷² Furthermore, the notice does not warn of the possibility that a client could not obtain all of his funds upon demand.¹⁷³ In addition, the notice gives the client no guidelines by which he could judge whether the size and longevity of his trust entitle him to the earnings of the trust.¹⁷⁴ In fact, the notice implies that a client has only two choices: to place his funds in a savings accounts for the benefit of unknown programs "designed to benefit the general public," or to place the funds in a non-interest-bearing trust checking account.¹⁷⁵

To insure that a client has made a knowing, voluntary, and intelligent waiver, several changes should be made. The notice should be expanded to identify all of the client's rights as a trustor and beneficiary. It should give the client guidelines by which to judge whether his trust is large enough to be invested economically for his benefit. Furthermore, the notice should warn the client that there is a possibility, although very small, that he could not obtain all his funds on demand.¹⁷⁶ Finally, use of the client's funds should be prohibited until the attorney receives from his client a signed waiver that includes a statement that the client knowingly, volun-

170. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 807, 810-11 (Fla. 1978).

171. See *id.* at 810-11. A return receipt is not even required. See *id.* at 810-11.

172. If, in fact, a court has no evidence that an individual is knowledgeable of his rights, it is certainly difficult to argue that such individual voluntarily and intelligently waived his rights. Furthermore, the court, as indicated by the notice it prescribed, must assume without justification that the client is aware of a trustee's duty to invest the funds of the trust for the maximum benefit of the beneficiaries or trustors, for it does not advise the client of this important fact. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 810-11 (Fla. 1978).

173. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 810-11 (Fla. 1978). If the institution where the trust savings account is deposited exercises its right to require a thirty or sixty-day notice of withdrawal, there is no guarantee that the client will receive all his money upon demand during the reserve period. See *id.* at 809-10 (to be codified in Integration Rule 11.02(4)(d)(iv)). An attorney may request funds to satisfy the client's emergency needs, but whether the request will be honored in full depends upon the rules and limitations imposed by the Foundation. See *id.* at 810 (to be codified in Integration Rule 11.02(4)(d)(iv)(c)). The notice, therefore, is misleading because it states that an attorney must keep a client's funds "available for immediate withdrawal," when in fact such funds may not be available upon demand. See *id.* at 810.

174. See *id.* at 810-11.

175. See *id.* at 810.

176. A person cannot waive a right of which he has no knowledge. *Andre v. Resor*, 313 F. Supp. 957, 959 (N.D. Cal. 1970), *aff'd per curiam*, 443 F.2d 921 (9th Cir. 1971); see *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972) (implied that waiver of property right must be made voluntarily, intelligently, and knowingly); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (whether waiver of right to counsel made voluntarily, intelligently, and knowingly depends upon circumstances of each case).

tarily, and intelligently authorizes his trust funds to be invested for the benefit of the organized bar.¹⁷⁷

Conflicts of Interest

Although opponents contend that the Florida plan creates a conflict with ethical standards prohibiting an attorney from benefiting from the investment of a client's funds,¹⁷⁸ no specific conflicts are identified.¹⁷⁹ It is difficult to understand how an attorney could benefit directly from his client's funds since he has no right to the principal or the interest of the trust.¹⁸⁰ An attorney might benefit indirectly, however, from the Florida plan and his client's funds, if the plan alleviated the need for him to pay greater dues to the Florida Bar for support of bar programs and the clients' security fund, or if he received payments from Florida Legal Services, Inc. for providing legal services.¹⁸¹ It is doubtful, however, that the Florida Bar Integration Rule and Code of Professional Responsibility will be construed so narrowly, as prior actions against attorneys under these rules have been limited to situations in which clients' funds were appropriated for use by attorneys.¹⁸² Ironically, it may be the attorney not participating in the Florida plan who does benefit directly from his clients' trust funds. For

177. If the question of waiver is ever litigated, the burden of proof will be on the party asserting that a valid waiver has been made. *See, e.g.,* *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972); *Gonzalez v. County of Hidalgo*, 489 F.2d 1043, 1046 (5th Cir. 1973); *United States v. White*, 429 F. Supp. 1245, 1251 (N.D. Miss. 1977). If for no other reason than to protect an attorney and ease his burden of proof, a signed waiver including the statement should be added.

178. *See In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 805 (Fla. 1978). Three law firms and the Florida Bankers Association contested the adoption of the plan. *See id.* at 799.

179. *See id.* at 805. *See generally* Brief in Response to Petition at 6, *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799 (Fla. 1978); Letter from Henry P. Trawick, Jr. to Taylor S. Boone (Sept. 6, 1978).

180. *See* FLA. STAT. ANN., Integration Rule 11.02(4) (West Supp. 1968-1978).

181. Earnings from clients' funds are to support a number of bar programs, such as grievance committee operations and the augmentation of the clients' security fund. *See In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 805, 811 (Fla. 1978). It is through innovations such as these that the attorneys can further the ethical standards of improving the legal system and of making legal counsel available. *See generally* FLA. STAT. ANN., Code of Professional Responsibility, Canons 2 & 8 (West Supp. 1968-1978).

182. The many law suits and opinions by the various bar associations concern situations in which an attorney has realized, or can realize a direct economic benefit from his clients' funds. *See, e.g.,* *The Florida Bar v. Bright*, 165 So. 2d 747, 748 (Fla. 1964) (borrowing and pledging clients' trust funds for collateral warranted attorney's suspension); AMERICAN BAR FOUNDATION, 1975 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS, No. 8157 (1972 FLA. OPS. 36) (placing clients' trust funds in certificates of deposit to reimburse law firm for expense of administering trust prohibited); AMERICAN BAR FOUNDATION, 1970 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS, No. 5979 (6 ARIZ. B.J. 36 (1970)) (depositing clients' funds in savings account in attorney's own name and for his own use prohibited without clients' prior consent).

example, prior to the time that the plan in Alberta, Canada was made mandatory, attorneys received free bank services from banks if they deposited clients' non-interest-bearing trust funds.¹⁸³ The important point is that care should be taken to insure that the earnings from clients' trust funds are not used in a manner that would appear to benefit attorneys directly.¹⁸⁴ The plan should emphasize programs that benefit the general public directly, such as legal aid and the clients' security fund, and to a lesser extent programs that appear to aid attorneys, such as funding legal libraries and subsidizing programs of continuing professional education.¹⁸⁵

Detailed Review of the New Plan Embodied in Integration Rule 11.02(4)(d)

An analysis of the Florida plan would not be complete without a close inspection of subsections of Integration Rule 11.02(4)(d) and their possible ramifications. Subsection (ii) of the rule provides that a bank or savings and loan association may not be a recipient of savings trust accounts, if during the past five years it has exercised its rights to require a thirty or sixty-day notice of withdrawal.¹⁸⁶ No explanation appears in the case before the Florida Supreme Court for choosing a period of five years.¹⁸⁷ In addition, there is no indication whether the banks in Florida regularly exercise their right to notice.¹⁸⁸ If, in fact, it is a common procedure for banks to require notice, the plan may effectively eliminate most of the banks in Florida as depositories for clients' trust accounts. Assuming that exercise of the right to notice is not common, subsection (ii), nevertheless, precludes any bank from participating in the plan solely because such bank exercised its right within the five year period before the Florida Supreme Court made its order establishing qualifications.¹⁸⁹ Although it is understandable that the bar and the court would desire the greatest assurance that a bank would not exercise its right to notice, it is questionable for a court to promulgate a regulation that appears retroactive.¹⁹⁰ It would

183. See Sadownik, *Interest on Lawyers' Trust Accounts*, 20 CHITTY'S L.J. 149, 149 (1972).

184. See Robertson, *The Law Foundation*, 27 ADVOCATE 264, 265 (1969).

185. See generally FLA. STAT. ANN., Code of Professional Responsibility, Canon 9 (West Supp. 1968-1978) ("A lawyer should avoid even the appearance of professional impropriety"). Although it can be argued that justice will be better served by providing attorneys with better libraries and refresher courses, it can also be argued that such actions could be misunderstood by the public and could lower the public confidence in the legal system and legal profession. See generally *id.*; Robertson, *The Law Foundation*, 27 ADVOCATE 264, 265 (1969).

186. See *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 809 (Fla. 1978). Compare 12 C.F.R. § 217.1(e)(2)(1978) (thirty days for federal banks) with FLA. STAT. ANN. § 654.02 (West 1966) (sixty days for state banks).

187. See generally *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799 (Fla. 1978).

188. See generally *id.*

189. See *id.* at 809.

190. Cf. *McCord v. Smith*, 43 So. 2d 704, 708-09 (Fla. 1949) (retroactive provision of legislative act is invalid when additional disabilities are established concerning prior acts).

be much more reasonable and would provide greater security if an attorney were required to contract with a bank to waive its right to notice.¹⁹¹ Even though the court's order cannot be considered *ex post facto*,¹⁹² adoption of the contract method would eliminate any argument by a bank that the order was invalid for creating a disability concerning the bank's prior exercise of its right.¹⁹³

Subsection (iv) may create a conflict with other sections within the Integration Rule and the Code of Professional Responsibility.¹⁹⁴ Under both of these official guides, an attorney must repay a client's funds held in trust upon demand,¹⁹⁵ but under the Florida plan embodied in Rule 11.02(4)(d) it is possible that a client could not obtain all his funds upon demand.¹⁹⁶ Although subsection (iv) is an attempt to insure that an attorney can always repay a client upon demand, it is remiss for two reasons. First, subsection (iv) (A) provides that the Foundation may advance an attorney only the amount of money necessary to meet the client's emergency needs.¹⁹⁷ Consequently, a conflict may arise since Disciplinary Rule 9-

The United States Constitution and many state constitutions include no express prohibition of civil laws that are retrospective. *See, e.g.,* *Johannessen v. United States*, 225 U.S. 227, 242 (1912); *Ross v. Board of Sup'rs*, 104 N.W. 506, 508 (Iowa 1905); *Gorham v. Robinson*, 186 A. 832, 852 (R.I. 1936). *See generally* FLA. CONST. art. 1, § 10. Nevertheless, in the states that may pass retroactive legislation, statutes may not be enacted that impair contractual obligations or vested property rights. *See McCord v. Smith*, 43 So. 2d 704, 708-09 (Fla. 1949); *Gorham v. Robinson*, 186 A. 832, 852 (R.I. 1936). *See generally* *Sturges v. Carter*, 114 U.S. 511, 519 (1885). Other states, however, specifically prohibit retroactive laws in their constitutions. *See, e.g.,* MO. CONST. art. 1, § 13; TENN. CONST. art. 1, § 20; TEX. CONST. art. 1, § 16.

191. A federal bank may, by contract, waive its right to the thirty-day notice of withdrawal. *See* 12 C.F.R. § 217.1(e)(2)(1978). If a bank made such a waiver, it would also have to waive its right to notice from all other depositors who are subject to the same remaining contractual provisions as in the case of the attorney. *See* 12 C.F.R. § 217.5(a)(1978). Apparently, state banks under Florida law would not be precluded from waiving their right to a sixty-day notice. *See generally* FLA. STAT. ANN. § 654.02 (West 1966).

192. *Ex post facto* prohibitions apply only to penal statutes or orders. *See, e.g.,* *Hari-siades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977).

193. *Cf. McCord v. Smith*, 43 So. 2d 704, 708-09 (Fla. 1949) (retroactive provision of legislative act invalid when additional disabilities established concerning prior acts).

194. *Compare* FLA. STAT. ANN., Integration Rule 11.02(4)(d)(iv) (West Supp. 1968-1978) (as ordered in *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 809-10 (Fla. 1978)) (attorney may request funds to meet client's emergency needs and Foundation may pay) *with id.* Rule 11.02(4) (attorney shall deliver all client's funds upon demand) *and* FLA. STAT. ANN., Code of Professional Responsibility DR 9-102(B)(4) (West Supp. 1968-1978) (lawyers must promptly pay client his funds).

195. *See* FLA. STAT. ANN., Integration Rule 11.02(4) (West Supp. 1968-1978); FLA. STAT. ANN., Code of Professional Responsibility DR 9-102(B)(4) (West Supp. 1968-1978).

196. *See* note 173 *supra*.

197. *See* FLA. STAT. ANN., Integration Rule 11.02(4)(d)(iv)(A) (West Supp. 1968-1978) (as ordered in *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 809 (Fla. 1978)).

102(B)(4) requires an attorney to make full repayment upon demand.¹⁹⁸ Second, even if the emergency needs of a client equalled his entire deposit, subsection (iv)(C) might nevertheless prevent a client from collecting all of his funds upon demand, since the subsection enables the board of directors of the Foundation to establish a withdrawal limit.¹⁹⁹ While the two conflicts may seldom arise, they point out that an attorney could find himself in violation of Integration Rule 11.02(4) and Disciplinary Rule 9-102(B)(4).²⁰⁰ Since attorneys electing to participate in the Florida plan are not exempted from any cause of action for failing to return all of a client's money upon demand,²⁰¹ they might be subject to an action for conversion brought by an injured client.²⁰²

Also subject to question is subsection (iv)(B), requiring an attorney to order the applicable bank to pay the Foundation directly an amount equal to the advance made to the attorney by the Foundation to meet his client's emergency needs. Federal banking regulations prohibit withdrawals from a savings account by payment to anyone but the depositor.²⁰³ These regulations, however, are subject to a number of exceptions, two of which appear applicable to the Florida plan.²⁰⁴ First, if the advance made by the Foundation is considered an extension of credit to the attorney, the trust savings

198. See FLA. STAT. ANN., Code of Professional Responsibility DR 9-102(B)(4) (West Supp. 1968-1978). The same conflict exists within Florida's existing integration rule. In FLA. STAT. ANN., Integration Rule 11.02(4) (West Supp. 1968-1978), an attorney must deliver money held in trust upon demand, with the exception of funds upon which exist a valid lien for his services, and a failure to make such a delivery is considered a conversion. It might well be argued that the Florida plan under Rule 11.02(4)(d) qualifies the attorney's more general obligation to make repayment upon demand, but the crux of this discussion is to point out where problems might arise, if for no other reason than vagueness. This problem could have been avoided if the court had specified explicitly whether the Florida plan was an exception to the general rule and if it had amended Disciplinary Rule 9-102(B)(4).

199. See FLA. STAT. ANN., Integration Rule 11.02(4)(d)(iv)(C) (West Supp. 1968-1978) (as ordered in *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 810 (Fla. 1978)). The maximum the board might establish could possibly be below a client's emergency needs and deposits.

200. See FLA. STAT. ANN., Integration Rule 11.02(4) (West Supp. 1968-1978); FLA. STAT. ANN., Code of Professional Responsibility DR 9-102(B)(4) (West Supp. 1968-1978).

201. Compare FLA. STAT. ANN., Integration Rule 11.02(4)(d) (West Supp. 1968-1978) (as ordered in *In re Interest on Trust Accounts*, a Petition of the Florida Bar, 356 So. 2d 799, 809-10 (Fla. 1978)) (no exemption specified) with Legal Assistance Act, Queensl. Stat. No. 67, sec. 10(2)(a), at 910 (1965), as amended by Queensl. Stat. No. 46, sec. 3(c)(1970) (exemption provided in Queensland, Australia) and Legal Profession Amendment Act, Alta. Stat. c. 114, sec. 7, § 109(2), at 489 (1972) (amending ALTA. REV. STAT. c. 203 (1970)) (exemption provided in Alberta, Canada).

202. See FLA. STAT. ANN., Integration Rule 11.02(4) (West Supp. 1968-1978) (refusal to deliver money upon demand deemed a conversion). Attorneys, in lieu of defending an action of conversion, could always draw upon their own funds and later collect from the bank. That action, however, may not be available depending upon the size of the client's deposits and the attorney's wealth and credit.

203. See 12 C.F.R. § 217.5(c)(1) (1978).

204. See *id.* § 217.5(c)(1)(iii) & (vii).

account could be considered a security, and the payment from such account enabling the Foundation to realize upon its security would be a permissible practice.²⁰⁵ The second exception would be one authorizing a bank to make payment to a third party pursuant to a non-transferable withdrawal order or authorization from the depositor.²⁰⁶ Given these two exceptions to the general rule, there should be no question of the validity of the subsection (iv)(B).

CONCLUSION

The Florida Supreme Court has adopted a concept that the organized bar of each state should explore and seriously consider promoting. The concept provides that clients' trust funds that cannot be economically invested for the benefit of clients and that would otherwise remain in non-interest-bearing accounts may be deposited in trust savings accounts to earn interest for the benefit of the organized bar. A number of Australian states and Canadian provinces have for some time authorized the use of clients' non-interest-bearing trust funds to support public legal programs. A review of the plans operating in both countries will provide an excellent background for understanding the plan adopted in Florida. The Florida plan is innovative and well worth copying in many respects. The plan, however, is not above question in certain aspects such as the manner of determining which banks are eligible to participate and the manner in which clients may waive their due process rights to the possession and use of their property. Consequently, bar associations considering adoption of the Florida plan may find it beneficial to explore alternatives some of which have been suggested in this comment.

205. *See id.* § 217.5(c)(1)(iii).

206. *See id.* § 217.5(c)(1)(vii).

APPENDIX I

A COMPARISON OF THE KEY PROVISIONS OF THE STATUTES RELATING TO SOLICITORS' TRUST ACCOUNTS IN THE AUSTRALIAN STATES OF VICTORIA, QUEENSLAND, SOUTH AUSTRALIA, AND NEW SOUTH WALES

Summary of Key Provisions	Victoria	Queensland	South Australia	New South Wales
	Yes ¹	Yes ⁸	Yes ¹⁵	Yes ²²
§1 All money received by a solicitor for or on behalf of another person shall be deposited in a trust account of a bank in this state.	Yes ¹	Yes ⁸	Yes ¹⁵	Yes ²²
§2 A solicitor shall transfer to the Law Society — of the lowest balance of his trust bank account during the preceding 12 month statutory period.	Not less than 1/3 ²	2/3 ⁹	a % prescribed by the society ¹⁶	Not more than 1/3 ³³
§3 In determining the amount to be transferred to the Law Society, any trusts maintained for the exclusive benefit of a person(s) shall not be included.	Yes ³	Yes ¹⁰	Yes ¹⁷	Yes ²⁴
§4 The funds transferred to the Law Society may be withdrawn by the solicitor on demand.	Yes ⁴	No ¹¹	Yes ¹⁸	Yes ²⁵
§5 All funds not withdrawn shall be invested by the Law Society, and the interest earned thereon shall be paid to the Solicitors' Guarantee Fund and the Legal Assistance Fund.	Yes ⁵	Yes ¹²	No May be invested ¹⁹	Yes ²⁶
§6 If the balance in the solicitor's trust account, including the amount on deposit with the Law Society falls below —, then the solicitor shall be excused from maintaining a deposit with the Law Society until his trust account exceeds	1,500 pounds ⁶	\$3,000 ¹³	\$2,000 for 12 months, then excused for 12 months ²⁰	N.A. ²⁷
§7 No action at law or equity shall accrue against the Solicitor or the legal society as a consequence of his compliance with this act.	No ⁷	Yes ¹⁴	Yes ²¹	No ²⁸

1. Legal Profession Practice Act, Vict. STAT. No. 6291, § 40(1) (1958), as amended by Acts Vict. No. 7226, sec. 6(1) (1964).
2. Legal Profession Practice (Amendment) Act, Acts Vict. No. 7226, sec. 6(2), § (2A)(a), at 443 (1964) (amending Vict. STAT. No. 6291, § 40 (1958)).
3. *Id.*
4. *Id.* sec. 6(2), § (2C) at 433, as amended by Acts Vict. No. 8954, sec. 40, § (2C) (1976).
5. Legal Profession Practice (Amendment) Act, Acts Vict. No. 7226, sec. 6(2), §§ (2C), (2D), at 444 (1964), as amended by Acts Vict. No. 8954, sec. 40 (1976) (amending Vict. STAT. No. 6291, § 40 (1958)).
6. Legal Profession Practice (Amendment) Act, Acts Vict. No. 7226, sec. 6(2), § (2G), at 445 (1964).
7. See Legal Profession Practice Act, Vict. STAT. No. 6291, § 40 (1958), as amended by Acts Vict. No. 7226, sec. 6 (1964), as amended by Acts Vict. No. 8954, sec. 40 (1976).
8. Trust Accounts Act, Queensl. Stat. No. 35, sec. 7(1), at 348 (1973).
9. Legal Assistance Act Amendment Act, Queensl. Stat. No. 46, sec. 3(c), at 535 (1970) (amending Legal Assistance Act, Queensl. Stat. No. 67, sec. 10(2)(a) (1965)).
10. Legal Assistance Act, Queensl. Stat. No. 67, sec. 10(2)(a), at 908 (1965).
11. *Id.* sec. 10(3)(a), at 909 (Law Society may repay funds when conditions warrant).
12. *Id.* sec. 10(4), (5), at 909.
13. Legal Assistance Act Amendment Act, Queensl. Stat. No. 46, sec. 3(f), at 535 (1970) (amending Legal Assistance Act, Queensl. Stat. No. 67, sec. 10(8) (1965)).
14. Legal Assistance Act, Queensl. Stat. No. 67, sec. 10(9), at 910 (1965).
15. Legal Practitioners Act, 1936-1972, Pub. GEN. ACTS S. AUSTRAL. § 22(2) (1978).
16. *Id.* § 24a(1).
17. *Id.* § 24a(3).
18. *Id.* § 24a(7).
19. *Id.* § 24c(3)-(6).
20. *Id.* § 24a(4).
21. *Id.* § 24d.
22. Legal Practitioners Act, 1898-1954, Pub. ACTS N.S.W. No. 22, § 41(1)(1960).
23. Legal Practitioners (Amendment) Act, Stat. N.S.W. No. 29, sec. 7(b), 42A(1)(a), (3), at 331-32 (1967) (amending Pub. ACTS N.S.W. No. 22, § 42 (1960)).
24. *Id.* sec. 7(b), § 42A(2), at 332.
25. *Id.* sec. 7(b), § 42B(1), at 335.
26. *Id.* sec. 7(b), § 44A(1), (2), at 335.
27. See generally Legal Practitioners Act, 1898-1954, Pub. ACTS N.S.W. No. 22, §§ 41-44 (1960), as amended by Stat. N.S.W. No. 29, sec. 7 (1967).
28. See generally *id.*

APPENDIX II

COMPARISON OF THE KEY PROVISIONS OF THE STATUTES RELATING TO SOLICITORS' TRUST ACCOUNTS IN THE CANADIAN PROVINCES OF ONTARIO, ALBERTA, MANITOBA, PRINCE EDWARDS ISLAND, NOVA SCOTIA, SASKATCHEWAN, AND BRITISH COLUMBIA

Summary of Key Provisions	Province						
	Ontario	Alberta	Manitoba	Prince Edwards Island	Nova Scotia	Saskatchewan	British Columbia
§1 Law foundation created.	Yes ¹	Yes ⁷	N.A. ¹³	Yes ¹⁹	Yes ²⁵	Yes ³¹	Yes ³⁷
§2 Objects of foundation are to create and maintain a fund providing for: (a) Legal education and research, (b) Legal aid services, (c) Establishment of law libraries, (d) Law reform.	a, b, & c ²	a, b, c, & d ⁸	N.A. ¹⁴	a, b, & d ²⁰	a & b ²⁶	a, b, & d ³²	a, b, c, & d ³⁸
§3 All money held for a client is to be placed in a trust account controlled by the solicitor to earn interest.	Yes ³	Yes ⁹	Yes ¹⁵	Yes ²¹	Yes ²⁷	No ³³	Yes ³⁹
§4 All interest earned on such trust funds is to be remitted to the foundation and becomes property of the foundation.	Yes ⁴	Yes ¹⁰	No ¹⁶	Yes ²²	Yes ²⁸	Yes ³⁴	Yes ⁴⁰
§5 Exceptions: Interest earned shall remain property of the client a. When there is a written agreement between solicitor and client on disposition of the interest, or b. When money is held in trust on an account for the client separate from all other accounts.	Yes ⁵	Yes ¹¹	Yes ¹⁷	Yes ²³	Yes, but barrister must advise client of right to earn interest on certain trusts ²⁹	Yes ³⁵	Yes ⁴¹
§6 Solicitor is not liable as a solicitor or trustee to account to client for interest paid to the foundation.	Yes ⁶	Yes ¹²	Yes ¹⁸	Yes ²⁴	Yes ³⁰	Yes ³⁶	Yes ⁴²

1. Act to Amend the Law Society Act, Ont. Stat. c. 49, sec. 3, at 51b(1), at 192 (1973) (amending ONT. REV. STAT. c.38, § 51 (1970)).
2. *Id.* sec. 3, § 51d(1), at 193.
3. *Id.* sec. 3, § 51f(1), at 194.
4. *Id.* sec. 3, § 51f(2), (3)(b), at 194.
5. *Id.* sec. 3, § 51f(5), at 194.
6. *Id.* sec. 3, § 51f(4), at 194.
7. Legal Profession Amendment Act, Alta. Stat. c. 114, sec. 7, § 102, at 486 (1972) (amending ALTA. REV. STAT. c. 203 (1970)).
8. *Id.* sec. 7, § 103(a), at 486.
9. *Id.* sec. 7, § 109(1), at 489.
10. *Id.* sec. 7, § 109(1), at 489.
11. *Id.* sec. 7, § 109(3), at 489.
12. *Id.* sec. 7, § 109(2), at 489.
13. The statutes do not provide for a law foundation in Manitoba. See generally Act to Amend the Law Society Act, Man. Stat. c.55, sec.3, at 322 (1972) (amending MAN. REV. STAT. c. L100, § 30 (1970)).
14. See *id.* sec. 3, § 30.2(3), at 322 (interest received by Minister of Finance used for legal aid services and education programs).
15. *Id.* sec. 3, § 30.2(1), at 322.
16. *Id.* sec. 3, § 30.2(2), at 322 (interest remitted to Minister of Finance and becomes property of provincial government).
17. *Id.* sec. 3, § 30.2(5), at 322.
18. *Id.* sec. 3, § 30.2(6), at 322.
19. P.E.I. REV. STAT. c. L-9, § 44(1) (1974).
20. *Id.* § 45(1).
21. *Id.* § 47(2).
22. Act to Amend the Law Society and Legal Profession Act, P.E.I. Stat. c.51, sec. 1, at 217 (1975) (amending P.E.I. REV. STAT. c. L-9, § 49(1)(1974)).
23. P.E.I. REV. STAT. c. L-9, § 49(2)(a) (1974).
24. *Id.* § 48.
25. Act to Amend the Barristers and Solicitors Act, N.S. Stat. c.22, sec. 2, § 47(1), at 173 (1976).
26. *Id.* sec. 2, § 48(1), at 175.
27. *Id.* sec. 2, § 50(1), at 177.
28. *Id.* sec. 2, § 50(1), at 177.
29. *Id.* sec. 2, § 50(3), at 177.
30. *Id.* sec. 2, § 50(2), at 177.

31. Act to amend The Legal Profession Act, Sask. Stat. c. 22, sec. 3, § 44A(1), at 184 (1971) (amending SASK. REV. STAT. c.301, § 44 (1965)).

32. *Id.* sec. 3, § 44C(1), at 185.

33. See Act to amend the Legal Profession Act, Sask. Stat. c.55, sec. 4, at 204-05 (1973) (amending SASK. REV. STAT. c. 301, § 44 (1965), as amended by Sask. Stat. c.22, sec.3 (1971)). At this point Saskatchewan differs from its sister provinces and adopts a system that appears to have been influenced by the Australian Plan. The following subsections are added:

(LA) Every solicitor receiving or holding money in trust for or on account of clients generally shall deposit the money as provided in subsection (1B) in an interest-bearing account.

(1B) During each successive period of twelve months commencing on the day on which this section comes into force the amount of the trust funds to be maintained on deposit according to subsection (LA) shall not be less than seventy-five percent of the least amount of trust funds held by the solicitor at any time during that period and the period twelve months immediately preceding that period.

(1C) Subsection (1B) shall not apply where the least amount of trust funds so held does not exceed \$5,000.

Id. 34. Act to amend The Legal Profession Act, Sask. Stat. c.22, sec. 3, § 44E(3), at 187 (1971) (amending SASK. REV. STAT. c.301, § 44 (1965)).

35. *Id.* sec. 3, § 44E(4), at 187.

36. *Id.* sec. 3, § 44E(2), at 187.

37. Act to amend the Legal Professions Act, B.C. Stat. c.15, sec. 16, at 189 (1969) (amending B.C. REV. STAT. c.214, § 71 (1960)).

38. *Id.* sec. 16, at 190.

39. Act to amend the Legal Professions Act, B.C. Stat. c. 49, sec. 2(a)(i)(k), at 266 (1974) (amending B.C. REV. STAT. c. 214, § 37 (1960), as amended by B.C. Stat. c. 15, sec. 6 (1969)).

40. Act to amend the Legal Professions Act, B.C. Stat. c.15, sec. 16, § 71I(2), at 191 (1969) (amending B.C. REV. STAT. c. 214, § 71 (1960)).

41. *Id.* sec. 16, § 71I(3), at 191.

42. *Id.* sec. 16, § 71I(1), at 191.